

Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:3 PLR-128523-02
Date:
September 6, 2002

Legend

Company =

Subsidiary =

State =

Business =

Country =

Sellers =

a =

b =

Dear :

This letter responds to a letter dated May 1, 2002, and subsequent correspondence, requesting on behalf of Company and Subsidiary an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration

Regulations for Company to elect for Subsidiary to be disregarded as an entity separate from its owner under § 301.7701-3(c). Company and Subsidiary also requested an extension of time pursuant to §§ 301.9100-1 through 301.9100-3 to make an election under § 338(g) of the Internal Revenue Code with respect to Company's acquisition of Subsidiary. The Service will respond to that request in a separate letter.

FACTS

Company, incorporated under the laws of State, is the common parent of an affiliated group of companies. Company and its subsidiaries are engaged in Business. Subsidiary is a foreign limited liability company formed under the laws of Country.

On a, Company acquired all of the stock of Subsidiary from Sellers in a fully taxable transaction. Company subsequently filed Form 8832, Entity Classification Election, to make a retroactive election for Subsidiary to be disregarded as an entity separate from its owner. The Form 8832, which specified an effective date of a, the stock acquisition date rather than the day after, b, was not signed by the Sellers. Company also intended to make a § 338 election relating to its acquisition of Subsidiary stock. However, Company failed to file the Form 8023, Elections Under Section 338 for Corporations Making Qualified Stock Purchase, required to make the election.

Company represents that it is not using hindsight in requesting relief and that no specific facts have changed since the due date for filing the election that make the election more advantageous to Company or Subsidiary. Further, Company represents that granting relief will result in the same aggregate tax liability with respect to affected taxpayers as had the election been made timely and that Company is not seeking to alter a return position for which an accuracy related penalty has been or could be imposed under § 6662. Finally, Company represents that the statute of limitations under § 6501 has not expired for Company or Subsidiary for the taxable year of the qualified stock purchase or any subsequent taxable year.

LAW & ANALYSIS

Section 301.7701-3(a) provides that a business entity that is not classified as a corporation under § 301.7701-2(b)(1), (3), (4), (5), (6), (7), or (8) (an eligible entity) can elect its classification for federal tax purposes as provided in § 301.7701-3. An eligible entity with a single owner can elect to be classified as an association or to be disregarded as an entity separate from its owner.

Section 301.7701-3(b)(2)(i) provides that except as provided in § 301.7701-3(b)(3), unless the entity elects otherwise, a foreign eligible entity is: (A) a partnership if it has two or more members and at least one member does not have limited liability; (B) an association if all of its members have limited liability; or (C) disregarded as an entity separate from its owners if it has a single owner that does not have limited liability.

Section 301.7701-3(c)(1)(i) provides in general that an eligible entity may elect to be classified other than as provided under § 301.7701-3(b) by filing Form 8832 with the applicable service center.

Section 301.7701-3(c)(1)(iii) provides that an election made under § 301.7701-3(c)(1)(i) will be effective on the date specified by the entity on Form 8832 or on the date filed if no date is specified on the election form. The effective date specified on Form 8832 cannot be more than 75 days prior to the date on which the election is filed and cannot be more than 12 months after the date on which the election is filed. If a purchasing corporation makes an election under § 338 regarding an acquired subsidiary, an election under § 301.7701-3(c)(1)(i) for the acquired subsidiary can be effective no earlier than the day after the acquisition date (within the meaning of § 338(h)(2)).

Section 301.7701-3(c)(2)(ii) provides that for purposes of § 301.7701-3(c)(2)(i), if an election under § 301.7701-3(c)(1)(i) is to be effective for any period prior to the time that it is filed, each person who was an owner between the date the election is to be effective and the date the election is filed, and who is not an owner at the time the election is filed, must also sign the election.

Section 301.7701-3(g)(3)(ii) provides that a purchasing corporation that makes a qualified stock purchase of an eligible entity taxed as a corporation may make an election under § 338 regarding the acquisition if it satisfies the requirements for the election, and may also make an election to change the classification of the target corporation. If a taxpayer makes an election under § 338 regarding its acquisition of another entity taxable as a corporation and makes an election under § 301.7701-3(c) for the acquired corporation (effective at the earliest possible date as provided by § 301.7701-3(c)(1)(iii)), the transactions under § 301.7701-3(g) are deemed to occur immediately after the deemed asset purchase by the new target corporation under § 338.

Under the facts as submitted, the entity classification election Company filed with respect to Subsidiary specified a retroactive effective date of a. For the election to be valid, the signatures of the prior owners of Subsidiary, the Sellers, were required pursuant to § 301.7701-3(c)(2)(ii). However, the signatures of the Sellers were not obtained. There is no authority under the regulations to treat an election that fails to comply with § 301.7701-3(c)(2)(ii) as valid. Therefore, the entity classification election Company filed for Subsidiary with an effective date of a, was not valid.

Under § 301.9100-1(c), the Commissioner may grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Code, except

subtitles E, G, H, and I. Section 301.9100-1(b) defines the term "regulatory election" as including an election whose due date is prescribed by a regulation published in the Federal Register.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-1(a).

Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government. Section 301.9100-3(a).

CONCLUSION

Based on the facts submitted and representations made, we conclude that Company has satisfied the requirements of §§ 301.9100-1 and 301.9100-3. Consequently, Company is granted an extension of time of 60 days from the date of this letter to make an election under § 301.7701-3 for Subsidiary to be disregarded as an entity separate from its owner effective b, which is the day after Company's purchase of Subsidiary stock and is consistent with an intended § 338 election. Company must file Form 8832 within the extension period with the appropriate service center, with a copy of this letter attached. A copy is enclosed for that purpose.

Except as specifically set forth above, we express or imply no opinion concerning the federal tax consequences of the facts described above under any other provision of the Code. Specifically, we express or imply no opinion concerning whether Company or Subsidiary otherwise are eligible to make the election. In addition no opinion is expressed or implied concerning whether Company may make a § 338 election with respect to Subsidiary.

Pursuant to a power of attorney on file with this office, a copy of this letter is being sent to Company and to a second authorized representative.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely,

/s/

HEATHER C. MALOY
Associate Chief Counsel
(Passthroughs and Special
Industries)

Enclosures (2)
Copy of this letter
Copy for § 6110 purposes